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# In the Supreme Court of the United States

MICHIGAN, ET AL., PETITIONERS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTILITY AIR REGULATORY GROUP, PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NATIONAL MINING ASSOCIATION, PETITIONER
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY BRIEF FOR PETITIONERS STATE OF MICHIGAN, ET AL.

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## INTRODUCTION

The major theme of the respondents' briefs is that Congress intended to treat all of American industry, including electric utilities, the same under 42 U.S.C. § 7412. But if that were Congress's intent, it would have had no reason to write a special provision imposing different criteria for regulating electric utilities. In § 7412(n)(1), Congress created a regime that separates out electric utilities from the § 7412(c) regime that "Congress enacted for all other stationary sources." EPA Br. 44. EPA's starting premise, then—that it should "harmonize" subsection (n)(1) with the rest of the statute by applying the same criteria that would govern if the subsection did not exist at all—is an unreasonable reading of the overall statutory scheme.

EPA's reading of § 7412(n)(1)'s specific language is equally unreasonable. EPA's brief confirms that its interpretation takes the central provision governing EPA's discretion over whether to regulate electric utilities—whether "such regulation is appropriate and necessary," § 7412(n)(1)(A)—and reads the term "appropriate" to be a word entirely redundant with the separate word "necessary." Treating a pivotal statutory term as surplusage is not *Chevron* gap filling; it is rewriting the statute. Here, the statutory text (the word "appropriate," which requires considering relevant circumstances, and (n)(1)(B)'s reference to costs, which shows costs are a relevant circumstance) and the context (Congress giving EPA discretion to decide whether to impose regulation that will affect the entire economy) confirm that it is unreasonable to conclude that costs are irrelevant.

## ARGUMENT

### I. EPA's interpretation of § 7412(n)(1) treats the word "appropriate" as meaningless and ignores a factor—costs—that Congress intended EPA to consider.

"[Courts] need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 272 (2010). Treating the key term "appropriate" as surplusage is not a reasonable or permissible reading of the statute. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (noting that the Court is reluctant to treat statutory terms as surplusage in any setting, and is "especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme"). Yet that is what EPA's approach to § 7412(n)(1) does: though the provision's focal point for whether EPA should regulate electric utilities is whether EPA concludes it is "appropriate and necessary" to regulate, EPA interprets the statute in a way that deprives the word "appropriate" of any independent meaning. This outcome is especially unreasonable given that "appropriate" has a broad meaning requiring EPA to consider relevant circumstances, EPA Br. 22, and the cost of imposing "such regulation" is a relevant circumstance.

#### A. EPA's reading unreasonably fails to give "appropriate" any meaning beyond that already ascribed to "necessary."

As its brief makes clear, EPA views § 7412(n)(1) as establishing a "harm-based inquiry" that focuses on the potential public-health hazards that could be

averted by regulating electric utilities. EPA Br. 26. In EPA's view, it is thus "necessary" to regulate if public-health hazards will exist after the imposition of other Clear Air Act requirements. EPA Br. 47 ("the 'necessary' prong considers how those dangers will be affected by the imposition of the Title IV acid-rain program and other CAA requirements.").

The following side-by-side comparison shows that EPA's "necessary" finding fully accounts for the potential public-health benefits of regulating.

| Utility Study | "Necessary" finding |
|---|---|
| "The Administrator shall perform a study of the *hazards to public health reasonably anticipated to occur* as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after the imposition of the requirements of this chapter." § 7412(n)(1)(A) (emphasis added). | "[A]fter implementation of other provisions of the CAA, HAP emissions [i.e., emissions of pollutants listed under § 7412(b)] from U.S. EGUs are *reasonably anticipated to pose hazards to public health*; therefore, it is necessary to regulate EGUs under CAA." 77 Fed. Reg. 9304, 9363 (Feb. 16, 2012) (emphasis added); see also EPA Br. 13. |

What work, then, is the word "appropriate" to do? According to EPA, it does the exact same work as "necessary." According to EPA, it is "appropriate" to regulate if (1) "hazardous-air-pollutant emissions from [power] plants pose a hazard to either public health or the environment" and (2) "controls are available to reduce such emissions." EPA Br. 45.

The first of these two criteria for "appropriate" is identical to the criterion EPA applies to "necessary"—the existence of a public-health hazard. This equivalence shows that the first criterion is not providing any independent meaning to "appropriate."

Neither is the second. While EPA contends the availability of controls factored into its "appropriate" finding, the argument is inconsistent with EPA's repeated statements during the rulemaking that it was *required* to find it appropriate to regulate if a hazard exists. E.g., 77 Fed. Reg. at 9326 ("The EPA reasonably concluded that we *must* find it 'appropriate' to regulate EGUs under CAA section 112 if we determine that a single HAP emitted from EGUs poses a hazard to public health or the environment.") (emphasis added); 76 Fed. Reg. at 24,988 ("EPA *must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment.") (emphasis added). If the simple existence of a hazard requires regulation, then the availability of controls is logically irrelevant and therefore not an actual basis for the "appropriate" finding. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

EPA fails to address these key portions of the administrative record, despite being confronted with them in the State Petitioners' opening brief (Br. 21–25). Instead, EPA paraphrases this key portion of the administrative record and, by substituting "may" for "must," changes its core meaning. Compare EPA Br.

12 ("EPA further proposed that it *may* find regulation to be 'appropriate' based 'on a finding that any single [hazardous air pollutant] emitted from power plants poses a hazard to public health or the environment.'" (emphasis added) (citing 76 Fed. Reg. at 24,988)), with 76 Fed. Reg. at 24,988 ("EPA *must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment.") (emphasis added).

EPA's paraphrasing contradicts what it actually said. EPA interpreted "appropriate" to *require* regulation based solely on identifying a hazard to public health or the environment from HAPs emitted by EGUs. This interpretation is unreasonable because Congress directed EPA to determine if regulation of electric utilities is both "appropriate" and "necessary." Rather than give each of those terms their own meaning, EPA interprets *both* "appropriate" and "necessary" to be satisfied if there are hazards to public health after imposition of the requirements of the Act, thereby turning the word "appropriate"—a pivotal term in § 7412(n)(1)'s statutory scheme—into surplusage.

Attempting to avoid this problem with its interpretation, EPA offers a single paragraph to explain how the terms "necessary" and "appropriate" might not "entirely overlap[]." EPA Br. 47. EPA concedes that "both terms require an inquiry into the health dangers posed by power-plant emissions," but appears to suggest that the two terms examine the dangers at different points in time: the "appropriate" finding looks at the "dangers as they exist 'at the

time' the finding is made," while the "necessary" finding "considers how those dangers will be affected [in the future] by the imposition of the Title IV acid-rain program and other CAA requirements." EPA Br. 47. But EPA made both components of the "appropriate and necessary" finding at the same time, and it based both findings on the same evaluation of those dangers—that is, on the Utility Study. Further, the Utility Study itself is forward looking: it looks not just at dangers existing at the time of the finding, but also at public-health hazards "reasonably anticipated to occur" even "after imposition of the requirements of this chapter." § 7412(n)(1)(A). In other words, it looks to the future after the imposition of the Title IV program and other CAA requirements. So EPA's one attempt to identify a difference between its "necessary" finding and its "appropriate" finding falls short.

EPA makes another argument about its interpretation of "appropriate": it contends that it *did* "evaluate[] the severity of anticipated health effects as part of its hazard analysis." EPA Br. 46 n. 16. But EPA evaluated the severity of health effects not when making its "appropriate" finding, but when determining "what constitutes a hazard to public health" in the first place. 76 Fed. Reg. at 24,992. And then it concluded that health effects that are severe enough to rise to the level of a public-health hazard *must* be regulated. E.g., 77 Fed. Reg. at 9326 ("The EPA reasonably concluded that we *must* find it 'appropriate' to regulate EGUs under [§ 7412] if we determine that a single HAP emitted from EGUs poses a hazard to public health or the environment.") (emphasis added). That is why EPA disavowed any

interest in the severity of remaining health hazards from electric utilities when making its "appropriate" finding. Instead, it concluded it "must" find it appropriate to regulate electric utilities under § 7412 if health hazards remain after imposition of the Act's other requirements—a finding it already made under its interpretation of "necessary."

Because EPA's interpretation treats a key statutory term as redundant, it is an unreasonable interpretation of the statute.

### B. By asking EPA to exercise its judgment to determine whether regulation was "appropriate," Congress intended that EPA consider both benefits and costs.

Congress did not intend for the word "appropriate" to be surplusage. To the contrary, Congress's use of that word demonstrates its intent for EPA to exercise judgment when deciding whether regulation would be "'suitable or proper in the circumstances.'" EPA Br. 22 (quoting *The New Oxford American Dictionary* 76 (2d ed. 2005)). To put it simply, Congress directed EPA to decide whether regulation is worth it.

EPA embraces this grant of discretion, conceding that by using the "'open-ended'" word "appropriate," Congress gave EPA "[s]ubstantial [d]iscretion" to make a policy judgment about whether it was also "appropriate" to regulate electric utilities. EPA Br. 21–23. It also observes that Congress chose not to "set forth an exclusive list of factors relevant to the decision whether to list power plants" under § 7412. EPA Br. 23. But the fact that Congress did not

expressly enumerate the relevant factors suggests that Congress expected EPA to consider all relevant factors, not to limit its judgment to considering *only* the one factor that Congress *did* enumerate—the benefits to public health that would result from regulating. Indeed, it is unreasonable to treat a grant of broad discretion to consider the relevant circumstances as a directive to put on blinders with respect to all circumstances except the one that Congress specifically spelled out. Cf. *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (recognizing that "expansive phrasing" in a statute "points directly away" from applying the interpretative canon that the enumerating one item implies exclusion of others).

EPA also argues that the reference to costs in § 7412(n)(1)(B) does not show that costs are relevant to the "appropriate" finding of § 7412(n)(1)(A), because the statute required EPA to consider the (n)(1)(A) study (the Utility Study), not the (n)(1)(B) study (the Mercury Study). EPA Br. 48. But EPA itself relied on certain components of the Mercury Study (specifically, the fact that it directs EPA to consider the "environmental effects" of emissions) when making the "appropriate" finding. Specifically, in the section addressing its basis for interpreting the word "appropriate," EPA reasoned that "the inclusion of environmental effects *in section 112(n)(1)(B)* indicates Congress's interest in protecting the environment from [hazardous-air-pollutant] emissions from EGUs as well." 76 Fed. Reg. at 24,988 (emphasis added). EPA thought that "Section 112(n)(1)(B) is *direct evidence* that Congress was concerned with environmental effects and cumula-

tive impacts of HAP emissions from EGUs." 76 Fed. Reg. at 24,987 (emphasis added). That reasoning applies with equal force to costs: § 7412(n)(1)(B) is "direct evidence" that Congress was concerned with costs of regulating HAP emissions from EGUs. Indeed, EPA reasoned that subsection (n)(1)(A)'s silence about a factor meant that the factor *should* be considered if that factor was expressly mentioned in (n)(1)(B): "had Congress intended to prohibit EPA from considering adverse environmental effects in the 'appropriate' finding, it would have stated so expressly." 76 Fed. Reg. at 24,988. This reasoning also reinforces the relevance of costs: to paraphrase, had Congress intended to prohibit EPA from considering costs in the appropriate finding, it would have stated so expressly. In this too, EPA's argument that (n)(1)(B)'s reference to costs is irrelevant is inconsistent with its own reasoning on a parallel issue.

### C. Congress intended for EPA to consider all relevant aspects of the problem, and costs are an important aspect.

A number of background rules also show that Congress intended for EPA to consider costs. First, Congress was drafting against the background principle of administrative law that reasoned decision-making requires an agency to consider all factors relevant to the problem before it. As this Court explained in 1983 in *State Farm*, an agency action qualifies as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem." 463 U.S. at 43.

Here, the regulatory problem before EPA was whether it was appropriate to impose regulation on

electric utilities. This decision, Congress knew, would have widespread effects on the economy, given electricity's ubiquitous role in keeping things running (lights, technology, heating) in everything from homes to hospitals to recycling plants. Congress also knew that mercury emissions were hazardous (having designated mercury as a hazardous air pollutant, § 7412(b), and having required the Mercury Study, § 7412(n)(1)(B)). By directing EPA not merely to conduct a study but also to take the additional step of deciding whether "such regulation is appropriate and necessary after considering the results of [the Utility Study]," § 7412(n)(1)(A), Congress was instructing EPA to look not just at the public-health hazards but at the whole problem—at the benefits *and* costs of regulating. Congress did not intend for EPA to depart from reasoned decision-making by acting with deliberate indifference to an important aspect of the problem—costs.

Second, when Congress enacted § 7412(n)(1) in 1990, it was drafting against the background principle of statutory interpretation that if Congress had wanted EPA to ignore costs, as EPA contends, Congress would have said so expressly. *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc).

For sources other than electric utilities, Congress did just that. As EPA acknowledges, Congress clearly precluded EPA from considering costs when it established criteria in § 7412(c) for listing "major" sources (the tonnages of hazardous-air-pollutant emissions above which listing is required) and for listing "area" sources (the threats to human health or

the environment that EPA must evaluate). E.g., EPA Br. 36 ("[T]he CAA *unambiguously* precludes consideration of costs in making the decision whether to list *other* source categories" under § 7412(c).) (first emphasis added).

In marked contrast, Congress did not preclude EPA from considering *any* factors; it directed EPA to determine whether regulation is "appropriate," using a broad term that requires EPA to consider the relevant factors. In the wake of the D.C. Circuit's 1987 ruling in *NRDC*, Congress's decision in 1990 *not* to expressly preclude EPA from considering costs in § 7412(n)(1)(A), even as it *did* preclude EPA from considering costs when listing other sources under § 7412(c), supports the plain-language argument that Congress intended EPA to take into account the relevant (and critical) factor of costs when making its appropriate finding. This background rule shows that any negative implications cut *in favor* of considering costs.

Rather than addressing how the D.C. Circuit's decision informed Congress's choice not to preclude EPA from considering costs in § 7412(n)(1)(A), the agency simply summarizes the court of appeals' ruling and contends that the State Petitioners "misread" it. EPA Br. 51. But if we are misreading it, then we are in good company. After all, the D.C. Circuit itself understands *NRDC* to stand for the principle that "[i]t is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Michigan* v. *EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000) (quoting *NRDC*, 824 F.2d at 1163).

*Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001), does not announce a contrary principle. It merely observes that in cases examining ambiguous sections of the Clean Air Act, the Court has refused to read in "an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* at 467 (citing *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257, & n.5 (1976)). Here, Congress *did* authorize the consideration of all relevant factors, including costs, by telling EPA to decide whether regulation was appropriate. In contrast to both *Whitman* and *Union Electric*, where Congress enumerated specific criteria, see State Pet'rs. Br. 26–27, here Congress did not enumerate factors. Rather, it ordered EPA to consider all circumstances—not just regulatory benefits—relevant to its determination whether to impose regulations. This is not trying to hide an elephant in a mousehole, *Whitman*, 531 U.S. at 468; this is about EPA's refusal to confront the elephant in the room—the enormous costs of its regulation.

Third, EPA does not appear to dispute "the common sense point that it is often reasonable to consider costs in determining whether particular regulatory burdens should be imposed." EPA Br. 19. Here, the decision to regulate means that particular regulatory burdens *will* be imposed. As EPA admits, "[i]f EPA determines that power plants should be listed," "it *must* set emissions standards" under § 7412. EPA Br. 7 (emphasis added). And, according to EPA, that means it *must* impose "floor" emission-reduction standards for which it "does not explicitly consider costs." EPA Br. 25. EPA's approach thus runs afoul of this "common sense point" that costs

are inherently relevant to an agency's decision whether to impose regulations. See State Pet'rs. Br. 29–32; see also Peabody Energy Amicus Br. 2.

## II. Congress intended to treat electric utilities differently from all other sources.

### A. EPA's decision to treat electric utilities the same as other source categories unreasonably disregards § 7412(n)(1)'s creation of a separate regime for them.

Rather than focusing on § 7412(n)(1)'s text, EPA steps back and looks at what it believes to be the big picture: EPA thought it was reasonable to interpret § 7412(n)(1) "to *harmonize with* the criteria that govern analogous NESHAP listing determinations for other stationary sources," rather than concluding "that Congress intended to *depart from* those criteria." EPA Br. 31. The problem with this argument is that it ignores the fact that Congress *did* expressly depart from those criteria in § 7412(n)(1), and that departure means those listing decisions are not analogous. If Congress wanted to treat electric utilities the same as other sources, it would have had no reason to include subsection (n)(1) in § 7412 in the first place.

EPA concedes that § 7412(n)(1) is "a special listing provision that applies only to power plants" and that it imposes "special requirements." EPA Br. 27. EPA also concedes, indeed emphasizes, that the § 7412(c) program—the National Emissions Standards for Hazardous Air Pollutants, or NESHAP—governs the listing determination for "all other source categories." EPA Br. 17; see also EPA Br. 12

("any other source category"), 18 ("all other stationary sources"), 19 ("all other source categories"), 24 ("all source categories *other than* power plants"), 26, 27, 28, 29, 31, 32, 37, 44 (discussing "the regime that Congress enacted for all other stationary sources"), 45.

EPA thus recognizes that Congress created two different regimes for deciding whether to regulate a source category. Under the § 7412(c) regime that applies to "all source categories *other than* power plants," EPA has little to no discretion when deciding whether to list the source: "Section 7412(c) *requires* the agency to list" any source that emits specific tonnages of hazardous air pollutants (i.e., major sources) or that "present[s] 'a threat of adverse effects to human health or the environment.'" EPA Br. 24, 25 (second emphasis added); see also EPA Br. 4 (acknowledging that in the 1990 amendments, "Congress eliminated much of EPA's discretion"). With respect to the § 7412(c) NESHAP regime, these specific criteria "reflect Congress's determination" about when it is appropriate to regulate. EPA Br. 25. In contrast, under the § 7412(n)(1) regime, EPA has substantial discretion to determine whether to regulate electric utilities based on its judgment as to whether "such regulation is appropriate and necessary." § 7412(n)(1)(A). Congress asked EPA to make the policy decision Congress made for other source categories.

Accordingly, § 7412(n)(1)(A) is not, as EPA mistakenly asserts, merely another threshold listing decision like those under § 7412(c) that focuses solely on hazards to public health or the environment. EPA

Br. 26 (construing "appropriate" to turn on a "harm-based inquiry" comparable to listing decisions under § 7412(c)). Section 7412(n)(1)(A)'s plain language requires EPA to also conduct a *regulation*-based inquiry after it considers the remaining health hazards. That regulation-focused analysis is reflected in the requirement that EPA "shall regulate" electric utilities under § 7412 if, "after considering the results of the study" on health hazards, it finds "*such regulation* is appropriate and necessary." § 7412(n)(1)(A) (emphasis added).

The criteria EPA must therefore apply when making the threshold determination that emissions from electric utilities warrant regulation is fundamentally different than the health-based inquiry for listing other sources under § 7412(c). For electric utilities, Congress mandated that EPA consider not only the remaining public health hazards identified in the study but also whether "such regulation" (that is, emissions standards EPA might develop to address any remaining hazards) would be "appropriate." And by instructing EPA to determine whether it would be "appropriate" to subject electric utilities to those emission standards, Congress required EPA to look ahead to the costs of those standards.

EPA maintains it is "farfetched" to suppose that Congress required EPA to use "fundamentally different" criteria when making the threshold determination whether to regulate electric utilities versus other sources. EPA Br. 32. But there is nothing farfetched about it; that is precisely the scheme Congress created. Congress explicitly established one

set of criteria for electric utilities (the study of public-health hazards and the "appropriate and necessary" finding under § 7412(n)(1)(A)) and a very different set of criteria for all other sources (tonnage quantities for major sources and a risk analysis for area sources under § 7412(c)).

EPA thus ignores the context in which (n)(1)(A) appears in § 7412's overall statutory scheme. And in doing so, EPA violates a basic rule of statutory interpretation: it has adopted an interpretation that is inconsistent with "the design and structure of the statute as a whole." *University of Texas Southwestern Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2529 (2013); see also *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

### B. Congress required EPA to consider costs at the threshold stage by creating (n)(1)(A)'s unique "appropriate" finding.

EPA also couches its argument as simply following the same two-step process Congress used elsewhere. EPA asserts that § 7412(n)(1)(A) is "a listing decision for power plants" like EPA's listing decisions for other sources under § 7412(c). EPA Br. 31. Under EPA's view of § 7412's overall scheme, *all* sources are subject to the same "multistage regulatory process" for listing "major" and "area" sources in § 7412(c), under which costs are considered only at the standard-setting second stage and not at the initial listing stage. EPA Br. 38–39. The agency interpreted § 7412(n)(1)(A) as a first-stage, threshold listing decision for electric utilities, like the listing decisions it makes for other sources, in which costs are not considered.

EPA's reading of § 7412 suffers from the same fatal flaw already noted: it ignores the fact that Congress treated electric utilities differently with regard to *when* EPA is to consider costs. Under the criteria it crafted in § 7412(n)(1)(A), Congress required EPA to evaluate health hazards *and* costs when it makes the threshold determination whether electric utilities should be regulated at all. More specifically, Congress directed EPA to evaluate any health hazards that remain after imposition of the Act's requirements, and then, critically, to consider the costs of complying with emission standards by deciding whether "such regulation" under § 7412 is "appropriate"—that is, by deciding whether the benefits from reducing the hazards are worth the costs. In other words, Congress required EPA to consider what the costs would be *before* imposing those costs on electric utilities and consumers of electricity throughout the country.

As EPA notes, the meaning and application of the "appropriate" requirement "depends on the particular context in which the term appears." EPA Br. 22. But EPA and the other respondents fail to acknowledge that in the context "appropriate" is used here (within § 7412(n)(1)(A) itself and in the broader context of § 7412 as a whole), Congress created a different approach for electric utilities than it took for all other sources. In this context, "appropriate" requires EPA to consider both the benefits of reducing any remaining health hazards by regulating electric utilities and the costs of regulation—to decide whether the benefits are worth the costs.

### C. Other provisions that apply to other source categories are not comparable to § 7412(n)(1)'s unique approach.

EPA's attempt to analogize § 7412(n)(1)(A) to other sections of the Clean Air Act suffers from the same flaw: they are not comparable. The agency identifies other sections of the Act that establish a "multistage regulatory process" whereby EPA makes a threshold decision in stage one about whether to regulate specific sources or pollutants based on an evaluation of hazards to public health or the environment and then considers costs when setting standards and limits in stage two. EPA Br. 38–39 (discussing the National Ambient Air Quality program, the New Source Performance Standards program, and the Motor Vehicle Emission and Fuel Standards program). What EPA overlooks is that Congress adopted different criteria in § 7412(n)(1)(A) by directing EPA to perform a study of health hazards and then make a finding of whether regulation is "appropriate and necessary." None of the provisions EPA cites has similar language.

EPA's reliance on other statutory provisions in which the word "appropriate" appears is also beside the point, because it misses a basic principle of statutory interpretation: context matters. No one claims (as EPA erroneously suggests) that EPA must consider costs in the context of deciding whether it is appropriate to invite the participation of the Secretary of Agriculture "when conducting a study of pollution damage to ecosystems" pursuant to 42 U.S.C. § 7403(e). EPA Br. 42. The point is not that the word "appropriate" by itself, divorced from any

statutory context, necessarily requires consideration of costs.

But in the statutory context at issue here—(n)(1)(A) and its place within § 7412—Congress used "appropriate" as a criterion for the "stage one" threshold determination for electric utilities, thereby choosing a standard that is fundamentally different from the criteria for making the threshold listing decisions for other sources under § 7412(c). When viewed in context, it is clear that by requiring EPA to decide whether regulation of hazardous-air-pollutant emissions from electric utilities is "appropriate" in light of the remaining health hazards from such emissions after imposition of the Act's other requirements, Congress required EPA to weigh the costs and benefits of such regulation.

## III. The delisting provisions in § 7412(c)(9) confirm that Congress established different criteria for when different sources should be regulated.

EPA claims that its interpretation of "appropriate" is reinforced by the delisting provisions in § 7412(c)(9). EPA Br. 18. According to the agency, the fact that costs are not considered when removing a category from the list of sources subject to regulation supports its refusal to consider costs when deciding whether it is appropriate to regulate electric utilities in the first place. *Id.*

Section § 7412(c)(9) supports the opposite conclusion. The delisting provisions are another example of how Congress established different criteria within § 7412 for when sources must be

regulated. In other subsections, *Congress* has established the standards that require EPA to regulate without EPA considering costs (including, for example, the tonnage thresholds above which "major" sources must be regulated).

But for electric utilities, Congress took a very different approach. Rather than use clear language as it did elsewhere to preclude EPA from considering costs, Congress instructed EPA to regulate if it found it was "appropriate" to do so in light of the public-health hazards remaining after imposition of the Act's other requirements. As noted above, Congress thereby intended that *EPA* would evaluate whether the benefits of regulating any remaining health hazards were worth the costs of imposing such regulation on consumers of electricity nationwide and the economy generally.

Thus, the delisting provisions in § 7412(c)(9) and the standards EPA must apply in § 7412(n)(1)(A) are not (as EPA supposes) "two sides of the same coin." EPA Br. 34. The provisions contain wholly different criteria, with one enumerating specific factors for EPA to consider when delisting sources and the other showing that Congress intended that EPA consider costs and benefits when deciding whether is "appropriate" to regulate electric utilities.

## IV. The rule's costs ($9.6 billion annually) outweigh its benefits ($4 to $6 million annually).

EPA concludes its brief by arguing that the benefits of the rule will in fact greatly exceed its costs, because the rule would reduce the emissions of

*non*-hazardous air pollutants, such as particulate matter. EPA Br. 55–56; see also 77 Fed. Reg. at 9305, 9306 ("EPA estimates that this final rule will yield annual monetized benefits (in 2007$) of between $37 to $90 billion," with, according to an accompanying chart, almost all of the benefits—$36 to $89 billion—coming from $PM_{2.5}$-related co-benefits). EPA then argues that it would be "appropriate" to consider these co-benefits and indeed that § 7412(n)(1)(A) "itself reflects Congress's judgment that co-benefits are a valid basis for making regulatory decisions *under the CAA*." EPA Br. 56–57 (emphasis added).

This is a classic case of the tail wagging the dog. Section 7412(n)(1)(A) is about regulating something specific: hazardous air pollutants. So, the cost-benefit analysis must focus on the benefits of reducing those particular pollutants and the costs of the regulation that would create the reductions. State Pet'rs. Br. 48. The benefits of reducing non-hazardous air pollutants do not factor in. And that presumably is why EPA emphatically refused to consider co-benefits in making its finding: as EPA put it when responding to one commenter, "a review of the proposed and final rules utterly refutes [the] commenter's assertion that [particulate matter] reductions form the basis for the appropriate and necessary finding." 77 Fed. Reg. at 9323.

In the end, EPA's argument that the $9.6 billion in costs it refuses to consider are not too high founders on a simple question: If EPA really thought the benefits outweighed the costs, why take the

position that costs are irrelevant? Why not simply conduct a cost-benefit analysis?

## CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed and EPA's final rule vacated.

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